In The

Supreme Court of the United States

October Term, 1974

No. 74-70

LEWIS H. GOLDFARB AND RUTH S. GOLDFARB, INDIVIDUALLY AND AS REPRESENTATIVES OF THE CLASS OF RESTON, VIRGINIA HOMEOWNERS,

Petitioners,

v.

VIRGINIA STATE BAR AND FAIRFAX COUNTY BAR ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR REHEARING

LEWIS T. BOOKER
JOHN H. SHENEFIELD
T. S. ELLIS, III
GARY V. MCGOWAN
HUNTON, WILLIAMS, GAY & GIBSON
Post Office Box 1535
Richmond, Virginia 23212

Counsel for Fairfax County Bar Association

July 11, 1975

In The

Supreme Court of the United States

October Term, 1974

No. 74-70

LEWIS H. GOLDFARB AND RUTH S. GOLDFARB, INDIVIDUALLY AND AS REPRESENTATIVES OF THE CLASS OF RESTON, VIRGINIA HOMEOWNERS,

Petitioners,

v.

VIRGINIA STATE BAR AND FAIRFAX COUNTY BAR ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR REHEARING

Respondent Fairfax County Bar Association (Fairfax) presents its petition for a rehearing of a pivotal issue left undecided by the Court in this case. In support thereof, Fairfax respectfully submits:

THIS COURT SHOULD DECIDE THE QUESTION WHETHER ITS DECISION IS TO BE APPLIED PROSPECTIVELY ONLY

This Court held on June 16, 1975, that lawyers' minimum fee schedules violate the federal antitrust laws. Chief Justice

Burger's opinion, however, does not address the question whether the decision should be applied prospectively only, even though that issue was fully briefed and argued before this Court. Instead, this Court remanded the case "to the Court of Appeals with orders to remand to the District Court for further proceedings consistent with this opinion."

Fairfax does not ask this Court to reopen any questions decided in its previous opinion. Rather, it merely asks the Court to decide the prospectivity issue, which was left undecided. This Court has in the past granted a petition for rehearing for the sole purpose of deciding questions argued but left open by the Court. *Silver King Coalition Mines Co. v. Conkling Mining Co.*, 256 U.S. 18, 25 (1921).

In the instant case, the reasons for granting this petition and deciding the prospectivity issue are compelling. This Court's resolution of the prospectivity question at this time will save both the courts and the litigants the time and expense required to relitigate that question on remand and perfect yet another appeal to this Court. Moreover, should this Court apply its decision nonretroactively, further proceedings on the question of damages will be unnecessary. Finally, allowing the decision on liability to apply retroactively would be grossly unfair and unnecessary.

A.

Resolution Of The Prospectivity Issue At This Stage Will Eliminate The Necessity Of Further Litigation.

If this Court does not now decide the prospectivity issue, the matter could find its way back to this Court for a second time. Obviously, this process would be very expensive and time consuming, both for the parties and the courts. This needless expenditure of time and money can be avoided by resolution of the prospectivity question at this

stage. Moreover, a ruling by this Court that its decision should apply nonretroactively would terminate this litigation, for further proceedings to determine the measure and extent of damages would then be unnecessary.

B.

Retroactive Application Of The Decision Would Be Unfair And Unnecessary.

As stated in Fairfax's brief, this Court has enunciated three criteria for determining whether a civil decision should be applied nonretroactively. First, "the decision . . . must establish a new principle of law, *either* by overruling clear past precedent on which litigants may have relied . . . , *or* by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . ." Second, a court should look "to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Third, a court should weigh "the inequity imposed by retroactive application. . . ." *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-07 (1971) (emphasis added). Because all three criteria are satisfied in this case, retroactive application of the decision would be not only inappropriate but also unfair and unnecessary.*

This Court's decision that bar associations' minimum fee schedules transgress the Sherman Act both overrules past precedent on which Fairfax relied and decides an issue of first impression, as this Court pointed out twice in its opinion, the resolution of which was not clearly foreshadowed. Until the District Court rendered its decision in this case, Fairfax had reasonably assumed that its advisory fee schedule did not violate the Sherman Act. All existing precedent pointed

* The prospectivity issue is fully briefed at pp. 57-63 of Fairfax's brief.

to the conclusion that the Sherman Act did not apply to the learned professions. *See Atlantic Cleaners & Dyers* v. *United States*, 286 U.S. 427 (1932); *FTC* v. *Raladam Co.*, 283 U.S. 643 (1931); *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs*, 259 U.S. 200 (1922).

Moreover, other circumstances strongly suggested the validity of bar associations' advisory fee schedules. The Canons of Ethics and the Code of Professional Responsibility contemplated and approved such schedules, and state court judges often referred to them in determining the amount of attorneys' fees to award. In 1961 and 1965 the Department of Justice expressed its view that advisory fee schedules promulgated by local bar associations were not subject to antitrust challenge. Indeed, the Justice Department never brought a suit challenging lawyers' advisory fee schedules until its recent action against the Oregon State Bar. To hold Fairfax accountable for treble damages in these circumstances would obviously be unfair, for it acted at all times in the good faith belief that it was obeying the law.

In addition, no useful purpose would be served by applying the decision retroactively. The mere announcement of the decision in this case will certainly deter bar associations and lawyers from retaining or promulgating minimum fee schedules. Allowing plaintiffs to reap treble damages in these circumstances would serve only to punish bar associations and lawyers for acts considered lawful when performed.

Finally, retroactive application of this decision would result in substantial inequity, for it would subject hundreds of local bar associations and thousands of lawyers to potentially ruinous treble damages liability for activities reasonably assumed to be lawful. In the instant case, for example, damages could conceivably amount to millions of dollars. Obviously, this would quickly consume the assets of Fairfax,

and in subsequent litigation not limited to Reston, Virginia, the monetary liability could easily go much higher.

Thus, to avoid the manifest unfairness of retroactive application of the decision in this case, this Court should apply its decision nonretroactively.

CONCLUSION

For the foregoing reasons, it is respectfully urged that this petition for a rehearing be granted to consider the issue of prospectivity. Alternatively, Fairfax asks this Court to amend its order by remanding the case to the Court of Appeals for the Fourth Circuit with instructions to decide the prospectivity issue.

Lewis T. Booker

Counsel for Respondent
Fairfax County Bar Association

LEWIS T. BOOKER
JOHN H. SHENEFIELD
T. S. ELLIS, III
GARY V. MCGOWAN
HUNTON, WILLIAMS, GAY & GIBSON
Post Office Box 1535
Richmond, Virginia 23212
Counsel

CERTIFICATE OF GOOD FAITH

I, Lewis T. Booker, counsel for the above-named Respondent, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

Lewis T. Booker

LEWIS T. BOOKER

CERTIFICATE OF SERVICE

I, Lewis T. Booker, hereby certify that I mailed three copies of the foregoing Petition for Rehearing to Alan B. Morrison, Esq., 2000 P Street, N.W., Washington, D.C. 20030, counsel for petitioners, and to Stuart H. Dunn, Esq., Assistant Attorney General, 1101 East Broad Street, Richmond, Virginia 23219, counsel for Virginia State Bar, this 11th day of July, 1975.

Lewis T. Booker

LEWIS T. BOOKER